1978

State of Utah v. Jackson : Brief of Appellants

Utah Supreme Court

David A. Goodwill; Attorney for Appellants;
David E. Littlefield; Franklyn B. Matheson; Attorney for the State of Utah;

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH in the interest of	:	
JACKSON, Rose Marie (01-16-68) JACKSON, Harold Pratt (11-11-72) JACKSON, Dollie Ann (07-31-74)	:	Case No. 15386
Persons under eighteen years of age.	:	

BRIEF OF MARVIN AND RUBY JACKSON

BIOLOGICAL PARENTS AND APPELLANTS

Appeal from the District Juvenile Court in and for
Salt Lake County, State of Utah
The Honorable Judith F. Whitmer

DAVID A. GOODWILL
336 South Third East #103
Salt Lake City, Utah 84111
Attorney for Biological
Parents and Appellants -
Marvin and Ruby Jackson

DAVID E. LITTLEFIELD
707 Boston Building
Salt Lake City, Utah 84111
Attorney and Guardian Ad Litem

FRANKLYN B. MATHESON
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for the State of Utah

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH in the	:	
interest of	:	
JACKSON, Rose Marie (01-16-68) JACKSON, Harold Pratt (11-11-72) JACKSON, Dollie Ann (07-31-74)	:	Case No. 15386
Persons under eighteen years	:	
of age.	:	

BRIEF OF MARVIN AND RUBY JACKSON

BIOLOGICAL PARENTS AND APPELLANTS

Appeal from the District Juvenile Court in and for
Salt Lake County, State of Utah
The Honorable Judith F. Whitmer

DAVID A. GOODWILL
336 South Third East #103
Salt Lake City, Utah 84111
Attorney for Biological
Parents and Appellants -
Marvin and Ruby Jackson

DAVID E. LITTLEFIELD
707 Boston Building
Salt Lake City, Utah 84111
Attorney and Guardian Ad Litem

FRANKLYN B. MATHESON
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for the State of Utah

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

STATUTES CITED

PERIODICALS CITED

NATURE OF THE CASE

This is a deprivation of parental rights case which originated in the Juvenile Court. The biological parents now seek a reversal of the order of the Juvenile Court with regard to the termination of all their parental rights.

DISPOSITION IN LOWER COURT

The Juvenile Courtentered an order placing the minor child, Carol, in foster care and denying the petition for permanent deprivation. The Juvenile Court ordered that Rose be placed for adoption, but afforded her the right to visit with her biological parents as desired. With regard to Harold and Dollie, the order permanently deprived the parents of all rights and ordered that these two children be placed for adoption.

RELIEF SOUGHT ON APPEAL

Appellants do not dispute the order with regard to Carol. They do seek the reversal of the order placing Rose, Harold and Dollie for adoption, and in the alternative modifying the order with regard to Harold and Dollie to permit these children to have contact with their biological parents.

STATEMENT OF FACTS

Viewing the record in a light favoring the successful party below, the evidence demonstrates the following:

1. The State filed a petition seeking permanent deprivation of all parental rights with regard to four children, Carol, Rose, Harold and Dollie.

2. At a hearing on March 8, 1977, the State moved to amend its petition and made an oral motion for psychological examinations of the parents, to which counsel for the parents objected.

3. On March 17, 1977, a pre-trial was held and new counsel for the parents objected to the re-newed oral motion for psychologicals except as it related to the completion of the previous testing already commenced by Dr. Tomb. A minute entry for March 17, 1977 indicated that the Court ordered Dr. Tomb to finish his psychological examination of the parents and the Court was to send a letter requesting the same to Dr. Tomb.

4. In April of 1977, Dr. Liebroder administered psychological tests to the parents and in May of 1977, Dr. Berensen administered psychological tests to the parents. Both of these tests were, apparently, conducted

at the request of Judge Whitmer. There is no record of the same however.

5. The Court made no findings that the physical, mental or emotional condition of the parents may be a factor in causing the neglect, dependency or delinquency of the children before ordering the psychologicals.

6. There was no notice of a hearing for the purpose of obtaining an order from the Juvenile Court that the parents submit to a psychological examination, nor was their due notice and hearing set for this specific purpose.

7. Following a lengthy trial, the Juvenile Court entered an order, granting a motion to dismiss the petition for permanent deprivation with regard to Carol and continuing her placement in temporary foster care. The Court, further, entered an order terminating all parental rights with regard to Rose, but in an effort to maintain a contact with her heritage, permitted her to visit with her parents as desired.

8. The Court also entered an order terminating all parental rights with regard to Harold and Dollie and ordering that they be placed for adoption.

ARGUMENT

POINT I

THE PSYCHIATRIC AND PSYCHOLOGICAL EXAMINATIONS WHICH WERE ADMINISTERED WITHOUT DUE NOTICE AND A HEARING SET FOR THIS SPECIFIC PURPOSE AND OVER THE OBJECTION OF COUNSEL FOR THE BIOLOGICAL PARENTS, ARE INVALID, AND SINCE THEY WERE THE MAIN BASIS FOR THE ORDER OF PERMANENT DEPRIVATION, THE ORDER PERMANENTLY DEPRIVING THE BIOLOGICAL PARENTS OF THEIR CHILDREN SHOULD BE VACATED.

In 78-3a-23, U.C.A. annotated as amended, the legislature set forth the following guidelines with regard to a psychological or psychiatric examination of parents:

> After due notice and a hearing set for the specific purpose, the Court may order a similar examination of a parent or guardian whose ability to care for a child is an issue, if the Court finds from the evidence presented at the hearing that the parents' or guardian's physical, mental, or emotional condition may be a factor in causing the neglect, dependency, or delinquency of the child.

In the instant case there was a hearing on March 8, 1977, during which the state moved to amend its petition for permanent deprivation, and counsel for the state made an oral motion for psychological examinations of the parents. Johnathan King, counsel for the parents

objected on the basis that the parents had already been examined by a Dr. Tomb in connection with another child, in another matter, and the Court observed that it would not make a decision at that time because counsel for the parents believed he had a conflict of interest.

On March 17, 1977 a pre-trial was held and Patricia De Michele, new counsel for the parents objected to the re-newed oral motion for psychologicals except as it related to the completion of the previous testing already commenced by Dr. Tomb.

The Court made no findings that the physical, mental or emotional condition of the parents may be a factor in causing the neglect, dependency or delinquency of the children. But, apparently, as the record is silent in this area, the Court sent a letter to Dr. Liebroder and Dr. Berensen requesting that they test the parents in connection with the case in question.

In April of 1977, Dr. Liebroder administered tests to the parents and in May of 1977, Dr. Berensen tested the parents. Both of these tests were conducted at the request of Judge Whitmer.

There is no indication in the file, of any kind, that due notice of a hearing for the purpose of obtaining an examination of the parents was ever submitted to the parents, or to counsel for the parents. Further, there is no indication that a hearing was set for the specific purpose of obtaining a psychological or psychiatric examination of the parents; and finally, there is no evidence of any kind in the record that the Court ever made a finding from evidence presented at said hearing that the parents' physical, mental or emotional condition may be a factor in causing the neglect, dependency or delinquency of the children.

Johnathan King, counsel for the parents, objected to the administering of the psychological examinations, T.4,L.20-22, and new counsel for the parents objected to the taking of the examinations, except for the completion of the report already commenced by Dr. Tomb, T.9,L.18.24. There was, therefore, no consent or waiver by counsel, of the parents' right to procedural due process under the statute.

The parties, individually, did not consent or waive their rights to procedural due process under

the statute in attending the psychological examinations administered by Dr. Leibroder and Dr. Berensen. The parties were instructed to attend the examinations and did what they were requested to do. As to whether or not the parents understood the effect of the request for psychologicals, Ruby Jackson has a disability which makes her unable to clearly understand instructions, even through an interpreter. Dr. Berensen testified as follows with regard to Ruby Jackson:

> Dr. Berensen: The person I relied upon and had to was the interpreter, and she's worked extensively with deaf people, as I understand it, her own parents were deaf, and I had to rely upon her as a second, you know, party to help me. She didn't indicate that Mrs. Jackson does not understand concepts, but that her lack of understanding is beyond what she has seen in the congenitally deaf, that there are other problems, is the way she put it, and she agreed to keep rephrasing the questions until she felt as though Mrs. Jackson understood them or else, she would say to me, "She does not understand that question, she's talking about something else". T.137,L5-15.

With regard to Marvin Jackson, it is also clear that he has difficulty in understanding. Dr. Berensen testified as follows:

Dr. Berensen: In my conclusion, my diagnostic impression is that Mr. Jackson would fit the category of inadequate personality with impulse disorder and a borderline I.Q. T.118,L.12-14.

If the parties were not handicapped with certain learning disabilities, they would certainly be entitled to all the protection the law affords with regard to the procedural safeguards of 78-3a-23, U.C.A. annotated as amended. Since they are handicapped with certain learning disabilities, the utmost care and concern should be taken to see to it that their rights are fully protected.

The Court, in ordering the psychologicals of the parents by Dr. Liebroder and Dr. Berensen, ignored the three (3) important procedural safeguards of 78-3a-23, U.C.A. annotated as amended as follows:

1. It directed the parents to submit to psychological or psychiatric examinations without concern for the due notice requirement of the statute.

2. It directed that the parents submit to psychological or psychiatric examinations without regard for the statutory requirement of a hearing set for the specific purpose of determining whether or not the parents' physical, mental, or emotional condition may be a factor in causing the neglect, dependency, or delinquency of the child or children.

3. It directed the parents to submit to psychological or psychiatric examinations without concern for the statutory mandate that the Court make findings from the evidence presented at a hearing that the parents' physical, mental or emotional condition may be a factor in causing the neglect, dependency, or delinquency of the child or children in question.

In reviewing the Findings of Fact and Conclusions of Law and Order, which are based heavily on the testimony of Dr. Berensen and the evidence introduced by Dr. Liebroder, the Court should reverse the order of the Juvenile Court which permanently terminated the rights of the biological parents and ordered that the children be placed for adoption, on the basis that the biological parents were not afforded their right to procedural due process in accordance with 78-3a-23, U.C.A. annotated as amended, in a proceeding that resulted in an order permanently depriving them of custody of 3 of their minor children and requiring that said children be placed for adoption.

POINT II

THE MINOR CHILD, ROSE, ALTHOUGH ADOPTABLE, HAS REACHED THE AGE AT WHICH IT WOULD BE IMPOSSIBLE TO

BREAK TIES WITH HER NATURAL PARENTS, AND IN KEEPING WITH THE BEST INTERESTS OF THE CHILD, THAT PART OF THE ORDER THAT SHE BE PLACED FOR ADOPTION SHOULD BE VACATED.

A. BASED ON THE FINDINGS OF FACT.

In paragraph 10 of the Findings of Fact, it is observed:

> Dr. Berensen, M.D., testified that in the case of both Rose and Carol, it would be difficult, in view of their ages, to break the ties with the natural parents.

The order with regard to Carol was that she not be placed for adoption and petitioners do not dispute the order placing her in temporary foster care with the opportunity to visit with petitioners.

With regard to Rose, however, the 10 year old minor child of petitioners, any order of the Court that the child be placed for adoption could not sever the strong ties she has with her natural parents and therefore, any attempt to place the child for adoption, thereby terminating all parental rights and responsibilities, would not be in keeping with this important Finding of Fact and that part of the order that the child be placed for adoption should be vacated.

B. BASED ON THE CONCLUSIONS OF LAW.

The conclusions of law were such that the Court concluded that adoption for Rose would be impossible as follows:

> Rose, although adoptable, has reached an age at which it would be impossible to break ties with her natural parents.

Therefore, the Court reached the conclusion that the ties with the natural parents were too strong for adoption to be a possibility and that part of the order that Rose be placed for adoption is inconsistent with the Conclusions of Law reached by the Court and should therefore be reversed.

C. THE STATE'S EVIDENCE DEMONSTRATES THAT ADOPTION IS NOT A POSSIBILITY FOR ROSE.

Dr. Berensen testified as follows:

Mr. Oddone: In terms of adoptability, would you speak to that issue as it relates to Rose?

Dr. Berensen: I would rather say that Rose has no psychiatric disabilities in great number, one, two, she shows great personality strengths and ability to integrate into another home. Taken those three factors into consideration, I would say that this child is adoptable, given certain modifications.

Mr. Oddone: What would those modifications be?

Dr. Berensen: Those modifications are that Rose has a heritage and that she needs to be able to call upon that heritage whenever she feels the need for it, so that Rose should always know that she has a set of natural parents and a group of siblings and she may at times need to see that family and she should know, as she does now and seems comfortable with it, that her parents cared about her, but that they were unable to take care of her.

Mr. Oddone: And you say she knows that now?

Dr. Berensen: She knows now, according to the Statement she made to me, "Mom and dad couldn't take care of the children" was the reason for her placement and was comfortable and accepting of that. T.130, L24-32; T.141 L1-10

If Rose were placed for adoption, under the law, she would haven no right to see her natural parents. In 78-30-11, U.C.A. annotated as amended, a complete severing between parent and child is dictated:

> The natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward and all responsibility for the child so adopted and shall have no further rights over it.

According to the testimony of Dr. Berensen, it is very important that Rose maintain her heritage and the right to see her parents and siblings as she feels the

need to do so. Therefore, any final order must comply with the Findings of Fact, Conclusions of Law, and the evidence presented; and, as an order placing the child for adoption is inconsistent therewith, that part of the final order should be stricken.

D. THE BEST INTERESTS OF THE CHILD SHOULD BE THE PARAMOUNT CONCERN OF THE COURT.

In Taylor v. Waddoups 121 U.274, 241 P.2d 157 (1952), the Court observed that the best interests of the child should be paramount in adoption matters.

In addition, in 78-30-9, U.C.A. the legislature has adopted the same policy as follows:

> The Court must examine all persons appearing before it pursuant to the preceding provisions, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, it must make an order that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

An attempt to create a fiction in the mind of a ten year old girl that a new set of adoptive parents are her biological parents is unreasonable and not possible due to the fact that this ten year old girl knows and needs the contact with her natural, biological parents.

The reason for creating the fiction that someone other than the biological parents gave birth to the child is the assumption that most adoptions would be

those where the biological parent or parents place an infant,not a fully developed child, for adoption, freely and voluntarily; believing that it is best for the child. Society seeks to protect the child from the hurt it would suffer from knowledge of the fact that it had been given away by its biological parents.

Does the reason for this fiction exist in the case of a child who is loved and wanted by parents who, nevertheless, cannot provide for her adequately; but where the child is old enough to have established some ties with the parents, such as in the case of ten year old Rose?

Since the law of adoption proceeds on the basis that an adopted child is the literal offspring of the adoptive parents and all rights and responsibilities with the biological parents are terminated on the date of adoption, adoption is not in keeping with the best interests of this ten year old child.

The child should continue to have the opportunity to visit with her biological parents, as ordered by the trial Court, and therefore an order doing more than depriving the parents of custody is inconsistent with the best interests of the child.

An order placing the child for adoption cuts off all rights of the child or the biological parents to associate with each other, and that part of the final order should, therefore, be vacated.

E. PUNISHMENT OF THE PARENTS IN A PERMANENT DEPRIVATION CASE SHOULD NOT BE THE PURPOSE OF THE FINAL ORDER, BUT THE BEST INTERESTS OF THE CHILD SHOULD BE THE PRIMARY GOAL OF ANY SUCH ORDER.

In 1970 Utah Law Review 325 it is observed as follows:

> If the state is genuinely interested in protecting the child, then the issue is the impact of the parent's action or nonaction upon the child. If the state's interest is in punishment of the parent, then the conduct of the parent is the issue and the impact on the child is of secondary relevance at best. It must be remembered that punishment of the parental misconduct is not the function of the adoption process; protection of the child is. A focusing on the failures of the parent without consideration of the impact on the child is totally inappropriate to the adoption process, however appropriate it might be for other legal action. [Emphasis added.]

To sever all contact between the biological parents and the child serves to punish the parents for their action or inaction, in failing to adequately meet the needs of their child. It does not, however, meet the needs of the child, and the order of adoption should be vacated.

POINT III

IF THE ORDER IS VALID WHICH PLACED ROSE FOR ADOPTION YET AFFORDED HER THE OPPORTUNITY TO BE AND ASSOCIATE WITH HER BIOLOGICAL PARENTS, AS SHE DESIRES, IN ORDER TO MAINTAIN A VITAL LINK WITH HER HERITAGE; THEN TO MAINTAIN THAT VITAL LINK FOR DOLLIE AND HAROLD, THEY SHOULD BE AFFORDED TO BE AND ASSOCIATE WITH THOSE SAME COMMON PARENTS.

A. HAROLD AND DOLLIE HAVE A RIGHT TO A SENSE OF HERIAGE.

The Court should be concerned not with legal niceties, but with the reality of what will occur if the children are placed for adoption, yet are denied all contact with their biological parents. Under Point I, appellants seek a complete reversal of the order of the Juvenile Court and in Point II a reversal of that part of the order requiring that Rose be placed for adoption. In the alternative, if the Court determines that an order is valid which places a child, rather than an infant, for adoption, yet grants it the right to visit and associate with its parents, as is the case with the order of the Juvenile Court for Rose, then appellants seek to obtain a like order with regard to Harold and Dollie.

Dr. Berensen aptly stated the concept when she responded to a question about what the effect an order would be on Carol and Rose if the parental rights were not terminated as follows:

Dr. Berensen: I find that difficult to answer because I feel that the important thing is what happens in reality rather than what is written down on paper legally. P.134, L. 13-15

Harold Jackson will be 6 years of age in November and Dollie Ann Jackson will be 4 years of age on July 31, 1978.

Certainly these 2 children know that while in foster care they are not with their biological parents. They will also know, when, and if, they are placed for adoption, that the adoptive parents are not their biological parents.

As they get older they will naturally want to know more about their biological parents. If they desire contact with their biological parents, now or in the future, they have no right to make that contact under the present order.

A child who can see for itself through face to face contact with loving biological parents that, as stated by Rose, they love her but aren't able to take care of her, can some how sort out and make sense of the confusing set of facts which gave rise to its having been taken from its biological parents and placed for adoption in the home of strangers.

In an article by Nancy Kupersmith, "The Fight to Open Up Adoption Records," June Reader's Digest, 27, (1978), we are able to take a look into the adoptee's feelings with regard to finding natural parents:

PERSONAL

Adult who was an adopted child desires contact with other adoptees to exchange views on adoptive situation and for mutual assistance in search for natural parents.

--Classified ad in New York Times, March 21, 1971

At the time she placed this ad, Florence Fisher had just successfully completed a 20-year search for her natural mother. Because adoption records are closed to adoptees in all states except Alabama and Kansas, those two decades had been filled with frustration and heartache. Her ad was an attempt to reach other adoptees seeking to fill the void that separates them from their past and an effort to help them avoid the soul-wrenching agony she had suffered.

Out of this vast mutual yearning, Fisher created an organization that is helping thousands of adoptees in the search for their roots. Today, her Adoptees' Liberty Movement Association (ALMA) is the largest organization of its kind, with 10,000 members scattered throughout the 50 states. ALMA's slogan: "The truth of his origin is the birthright of every man."

By providing answers, encouragement and hope, ALMA is helping adoptees gain what everyone else takes for granted: the sense of heritage that answers the most basic and haunting of human questions, "Who am I?"

> Without it, adoptee Pam Synge Hasegawa, an ALMA member, claims she is like an island. "I want to touch the mainland--to ask 'Who? Why?'" she says. Anita McCarthy, another ALMA member, adds: "The real me lies frozen inside. My children have only half of their heritage--their father's. Is mine any less important because I was adopted?"
>
> Yet, little by little, legal opinion is swinging toward the adoptee. In February 1977, in the most significant court decision so far, a New Jersey superior court forced an adoption agency to search for the natural parents; if unsuccessful, the agency must give the records to the adoptee, unless the state shows "good cause" why he should not have them.

The reasons for placing the children permanently for adoption are not inconsistent with regular contact with their biological parents and Harold and Dollie should be permitted to visit and associate with their natural parents, thereby maintaining a sense of heritage.

B. THE ADOPTION STATUTES DO NOT SPECIFICALLY PROHIBIT CONTACT BY A CHILD WITH ITS BIOLOGICAL PARENTS.

The purpose of the Juvenile Court act is to strengthen family ties whenever possible. In 78-3a-1, U.C.A. annotated as amended it is observed:

> It is the purpose of this act to secure for each child coming before the juvenile court such care, guidance and control, preferably in his own home, as will serve his welfare and strengthen family ties whenever possible; to secure for any child who is removed from his home the care, guidance and discipline required

to assist him to develop into a responsible citizen, to improve the conditions and home environment responsible for his delinquency; and, at the same time to protect the community and its individual citizens against juvenile violence and juvenile law breaking. To this end this act shall be liberally construed.

We are not here dealing with the placement of infants for adoption, but with children who are ages 4 and 6 respectively and who, in reality, will not believe that the adoptive parents are their natural or biological parents and will have many questions concerning their own heritage.

It is submitted that three adoption statutes govern the relatinship between parent and child and the natural or biological parents, as follows:

1. In 78-30-9, U.C.A. annotated as amended it provides:

> The court must examine all persons appearing before it pursuant to the preceding provisions, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, it must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

2. In 78-30-10, U.C.A. annotated as amended it provides:

> A child when adopted may take the family name of the person adopting. After adoption the two shall sustain the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

3. In 78-30-11, U.C.A. annotated as amended it provides:

> The natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward and all responsibility for the child so adopted, and shall have no further rights over it.

None of the foregoing statutes state specifically that the child shall be prohibited from being and associating with its natural or biological parents. Furthermore, these same statutes apply equally to the case of an infant, a fully developed child or an adult. It is submitted that the intent of these statutes is to sever the legal relationship and rights and obligations between the biological parent and the child but that there is no intent to create in the mind of a child old enough to have established ties with the natural parent a fiction in the mind of said child that the adoptive parents are, by virtue of the adoption decree, the biological parents of the child.

It is submitted that since the children can benefit by long term placement where there is no chance for the child to be shifted from foster home to foster home, or from a foster home back and forth

between the biological parent and the foster home, if the children were placed for adoption, the needs of the children would be met; but to fully meet the needs of the children, there should be a tie to their heritage or biological parents and they should be permitted and accorded every right to visit and associate with their biological parents.

CONCLUSION

Appellants seek an order vacating the order of the Juvenile Court which terminated all their parental rights to Rose, Harold and Dollie. In the alternative they seek an order vacating that part of the order with regard to Rose which ordered that she be placed for adoption. Finally, if the Court concludes that the order depriving the parents of all parental rights is valid and the order placing Rose for adoption, yet affording her the right to visit with her natural parents as she desires is also valid; then, appellants seek an order that Harold and Dollie be accorded the right to visit and associate with their biological parents.

Respectfully submitted,

DAVID A. GOODWILL
Attorney for Petitioners and Appellants Marvin and Ruby Jackson
336 South Third East #103
Salt Lake City, Utah 84111

CERTIFICATE

I hereby certify that I mailed or hand delivered two copies of the attached brief to each of the following named parties at the addresses therein stated, postage prepaid, on this 17th day of July, 1978.

To Wit:

David E. Littlefield
Attorney and Guardian Ad Litem
707 Boston Building
Salt Lake City, Utah 84111

Frank Matheson
Attorney for the State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114